



OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

November 20, 2000

Mr. Scott A. Kelly
Deputy General Counsel
Texas A & M University System
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301 Tarrow
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OR2000-4464

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141402.

The Texas A&M University System ("A&M") received a request for "all of the materials that Mary Zey submitted to Texas A&M University to support her claims that [the requestor] misappropriated data and committed plagiarism." A&M does not assert that any exception to public disclosure applies to the information responsive to this request. A&M also indicates that it has released "most of the materials responsive to this request." However, A&M contends that the property or privacy interests of a third party, Mary Zey, are implicated by the release of the responsive information that Mary Zey has designated as proprietary. A&M provided a sample of this information to this office for review.¹ A&M notified this third party of the request for information, and informed her of her opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Ms. Zey has provided comments to this office, asserting that all responsive materials are excepted from disclosure by section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, and by section 552.110 of the Government Code. Ms. Zey notes that responsive information was provided by her to A&M pursuant to agreements that it be kept confidential. Ms. Zey also refers to information which is not responsive to the subject request. This opinion does not address information which is not responsive to the subject request. We have considered the arguments asserted and reviewed the submitted information.

We first note that all information held by a governmental body is open unless the information falls within one of the Public Information Act's specific exceptions to disclosure. Open Records Decision No. 497 at 4 (1988). This office has held that, by providing that all information that a governmental body collects, assembles, or maintains is public unless expressly excepted from disclosure, the Act prevents a governmental body from making an enforceable promise to keep information confidential unless that governmental body is authorized by law to do so. *See* Open Records Decision Nos. 585 at 2 (1991), 514 at 1 (1988). Simply stated, without express authority, a governmental body may not circumvent the disclosure requirements of the Act by entering into an agreement with a provider of information. We are aware of no statutory authority which would enable A&M to enter into such an agreement in regard to the information that is responsive to this request. Therefore, A&M's agreements to maintain the confidentiality of the subject information do not affect its responsibility to disclose this information in response to a request made under the Act. We also note that some of the responsive information may be copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). The responsive information may be withheld from inspection only if an exception to disclosure is demonstrated to apply to this information.

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including information made confidential by statute. Section 51.914 of the Education Code provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

We are of the opinion that information which has been disseminated to the public, by presentment or publication, is not protected by this statute, since the confidentiality of such information has been effectively waived by the presenter or author. Therefore, the submitted materials which have been published in the professional literature, or presented at conferences or other professional peer events, are not made confidential by section 51.914 of the Education Code.

From our review of the submitted information, we conclude that it does not relate to a "product, device, or process [or] the application or use of such a product, device, or process." Therefore, the information is made confidential by this statute only if it is "technological and scientific information . . . developed in whole or in part at a state institution of higher education" and has a "potential for being sold, traded, or licensed for a fee."

We find that the draft article titled *An Accumulation Crisis Theory of the Transformation of Corporate Form: The 1980s Transformation from Multidivisional Forms to Corporate Groups of Subsidiaries*, and found in "Handout 52" of the submitted materials, consists of technological or scientific information that was developed in part at a state institution of higher education.

Whether particular information has "potential for being sold, traded, or licensed for a fee" is a question of fact that this office is unable to resolve in the opinion process. Open Records Decision No. 651 (1997). Here, the affected third party has asserted that the materials subject to this request "reflect a distillation of years of her research and academic work," that they "have the potential for being sold, traded, or licensed for a fee," and that she is presently "working on a single-authored book incorporating [her] years of research. The book will be copyrighted, and [she] expect[s] to receive royalties for the book." No arguments which contradict these assertions have been presented to this office. We therefore find that it has been established that this draft article and similar unpublished materials, are made confidential by section 51.914 of the Education Code and must be withheld under section 552.101 of the Government Code.

We now address Ms. Zey's argument raised under section 552.110 of the Government Code. This section reads as follows: .

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.
- (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

This section protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).²

Other than the draft articles which have been found to be made confidential by section 51.914 of the Education Code, the information submitted by A&M consists of published or presented materials and a memorandum dated March 10, 2000, titled "Materials Related to My Complaint," with attachments thereto.

As the listed factors make clear, the gravamen of a trade secret argument is the degree to which the information is kept *secret*. We are of the opinion that information that has been published or publicly presented cannot be protected as a trade secret. Therefore, such information may not be withheld under section 552.110(a) of the Government Code. Similarly, it cannot be demonstrated that release of such information would cause competitive harm to the person from whom the information was obtained. Therefore, information which has been published or presented cannot be withheld under section 552.110(b) of the Government Code.

The memorandum dated March 10, 2000, and the attachments thereto, consist of arguments, and evidence regarding an academic inquiry. From our review of this information, we conclude that it is not, and does not include, a "formula, pattern, device or compilation of information which is used in one's business" as contemplated in the above-referenced definition of "trade secret." Therefore, this information may not be withheld under section 552.110(a) of the Government Code. We also conclude that it is not "commercial or financial information" as contemplated under section 552.110(b) of the Government Code. We find that none of the submitted information may be withheld under section 552.110 of the Government Code.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In summary, responsive technical or scientific information, which has not been published or presented, such as the submitted draft article, titled *An Accumulation Crisis Theory of the Transformation of Corporate Form: The 1980s Transformation from Multidivisional Forms to Corporate Groups of Subsidiaries*, found in "Handout 52" of the submitted materials, and any working papers or notations, must be withheld under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. All other responsive information must be made available to this requestor if copyrighted and copied and released to this requestor, if not copyrighted.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

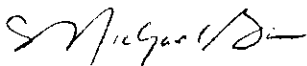
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 141402

Encl: Submitted documents

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